A

AmTrustee Bhd v The Store (M) Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2230–11 OF 2017
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
13 JUNE 2019

C

Contract — Tenancy agreement — Construction of agreement — Whether parties were never ad idem that tenancy agreements would be renewed without increase in rental — Whether clause in agreements clearly provided that every renewal of tenancy was subject to maximum rental increment of 10% over rate of D *last preceding term — Whether trial judge's finding that tenancies had been renewed without increase in rental because landlord had not stated definite rental increase figure was wrong and went against clear wordings of tenancy agreements*

Pursuant to two tenancy agreements ('the TAs') containing similar terms and E conditions, the respondent rented space in two shopping malls owned by the appellant. Clause 3.04 of the TAs provided, inter alia, that: (a) the respondent had an option to renew the tenancy 'for six separate but consecutive terms of three years each with rental increment at maximum of 10% over the rate of the last preceding term'; (b) that if the respondent desired to exercise the said F option 'it shall exercise the same separately and in successive order and shall not less than three months of each of the aforesaid consecutive terms ... give written notice to the landlord of such desire'; and (c) if the respondent 'shall omit or ... fail to renew or exercise the option to renew any of the said consecutive terms ... then the tenant shall be entitled to automatic renewal(s) of the tenancy'. The G respondent gave the appellant notice of intention to renew the tenancies coupled with a request that the rental not be increased. The appellant replied that it could not agree to maintain the rental at the same rate and proposed an 8% increment to the rent if the respondent agreed to enter into a fresh tenancy agreement on new terms; but if respondent disagreed with the proposal, the H appellant reserved the right to impose a maximum 10% increment. The respondent rejected the appellant's 'conditional proposal' and asked the appellant to state its 'unconditional monthly rate' for the renewal term so that the necessary payments could be made, but if the appellant insisted on raising the rent, the respondent, on a strictly without prejudice basis asked the I appellant to send a draft tenancy agreement for its consideration. Although the appellant did not reply to that letter, it tried to negotiate for almost a year with the respondent in the hope of getting the latter to enter into fresh TAs on new terms. The negotiations failed when the respondent took the position that the TAs had been renewed without any increase in the rental. Unable to accept the

respondent's unilateral stand, the appellant issued a notice of termination ('NOT') to terminate the tenancies. The respondent filed suit against the appellant for a declaration that the NOT was void and that the TAs were valid. The appellant counterclaimed for a declaration that the renewal of the TAs was subject to a 10% increase in rental and that the NOT was valid. Following a trial, the High Court allowed the respondent's claim and dismissed the counterclaim. The trial judge held that the appellant never made an unconditional offer of a rental increase of either 8% or 10%; instead its offer of an 8% increase was subject to the respondent entering into a fresh TAs which contained new terms not agreeable to the respondent. The respondent was, therefore, entitled to reject the conditional offer because it departed from the terms agreed to by the parties in cl 3.04. The trial judge held that since the appellant had not made any unconditional offer of an increase in the rental, pursuant to cl 3.04, the respondent was entitled to an automatic renewal of the tenancies without any increase in the rental. The trial judge held that the NOT was void because the reason for its issuance — ie, that the respondent had rejected the offer of an 8% increase in the rent — was flawed. The instant appeal was against the trial court's decision.

Held, allowing the appeal and setting aside the High Court's decision:

(1) The trial judge erred in finding that the TAs were automatically renewed without any increment in rental because: (a) the issue was not that the respondent had failed or omitted to exercise the option to renew the tenancies for the trial judge to rely on the second part of cl 3.04, which was not relevant; (b) the respondent did, in fact, confirm by way of letter the renewal of the tenancies to which the appellant stated that if its proposal (to an 8% increase) was not agreeable, the appellant reserved the right to impose the maximum increment of 10% to the rent for the renewed term; (c) the parties were in negotiations on the fresh TAs, which failed because the respondent could not agree on the proposal or the fact that the respondent unilaterally decided that the TAs were renewed without rental increment; and (d) as per cl 3.04, the appellant was entitled to rent at a maximum of 10% over the rate of the last preceding term as every renewal of the TAs was subject to a maximum rental increment of 10% (see paras 21 & 30).

(2) There was clearly no *consensus ad idem* between the parties to renew the TAs without any rental increment. The appellant had expressly informed the respondent at the earliest opportunity that it was not agreeable to waiving any rental increment for the renewal of the tenancies. The evidence adduced at the trial showed that although the rent for the renewed term was expressly stated in the first schedule to the TAs, there was clear dispute and disagreement between the parties when the respondent took the position that the tenancies had been renewed with no increment, which was contrary to the appellant's position and the

express wordings of the TAs. The position taken by the respondent was detrimental to the appellant and a blatant disregard of the appellant's rights under the agreements. It was wrong for the respondent to argue that the tenancies were automatically renewed with no increment or with no regard as to how much the increment rate would be. In the circumstances, the appellant was entitled to terminate the TAs by issuing the NOT (see paras 34(a), 36–38 & 40–41).

[Bahasa Malaysia summary

Menurut dua perjanjian penyewaan ('PP') yang mengandungi terma dan syarat sama, responden telah menyewa ruang dalam dua pasaraya yang dimiliki oleh perayu. Fasal 3.04 PP tersebut memperuntukkan, antara lain, bahawa: (a) responden mempunyai pilihan untuk memperbaharui penyewaan itu 'for six separate but consecutive terms of three years each with rental increment at maximum of 10% over the rate of the last preceding term'; (b) jika responden berhasrat untuk menggunakan pilihan tersebut 'it shall exercise the same separately and in successive order and shall not less than three months of each of the aforesaid consecutive terms...give written notice to the landlord of such desire'; dan (c) jika responden 'shall omit or ... fail to renew or exercise the option to renew any of the said consecutive terms ... then the tenant shall be entitled to automatic renewal(s) of the tenancy'. Responden telah memberikan perayu notis penamatan untuk memperbaharui penyewaan tersebut bersama permintaan agar sewa tidak dinaikkan. Perayu menjawab bahawa ia tidak bersetuju untuk mengekalkan pada kadar yang sama dan mencadangkan kenaikan 8% kepada sewa itu jika responden bersetuju untuk memasuki perjanjian penyewaan baharu atas terma baharu; tetapi jika responden tidak bersetuju dengan cadangan itu, perayu mempunyai hak untuk mengenakan kenaikan maksimum sebanyak 10%. Responden telah menolak 'conditional proposal' perayu dan meminta perayu menyatakan 'unconditional monthly rate' untuk terma pembaharuan supaya bayaran yang perlu boleh dibuat, tetapi jika perayu berkeras untuk menaikkan sewa, responden, atas dasar tegar tanpa prejudis meminta perayu untuk menghantar draf perjanjian penyewaan itu untuk pertimbangannya. Walau pun perayu tidak menjawab surat tersebut, ia cuba berunding hampir setahun dengan responden dengan harapan mendapatkannya memasuki PP baharu dengan terma baharu. Perundingan itu gagal apabila responden membuat pendirian bahawa PP itu telahpun diperbaharui tanpa apa-apa kenaikan sewa. Tidak dapat menerima pendirian unilateral responden, perayu telah mengeluarkan notis penamatan ('NP') untuk menamatkan penyewaan itu. Responden telah memfailkan guaman terhadap perayu untuk satu deklarasi bahawa NP itu tidak sah dan bahawa PP itu adalah sah. Perayu telah membuat tuntutan balas untuk deklarasi bahawa pembaharuan PP itu adalah tertakluk kepada kenaikan sewa 10% dan bahawa NP itu adalah sah. Berikutan perbicaraan, Mahkamah Tinggi telah membenarkan tuntutan responden dan menolak tuntutan balas. Hakim yang bijaksana memutuskan bahawa perayu tidak pernah membuat tawaran tanpa

syarat tentang kenaikan sewa itu sama ada 8% atau 10%; sebaliknya tawarannya untuk kenaikan 8% adalah tertakluk kepada responden memasuki PP baharu yang mengandungi terma baharu yang tidak dipersetujui responden. Responden, dengan itu, berhak untuk menolak tawaran bersyarat itu kerana ia terpesong daripada terma yang dipersetujui oleh pihak-pihak dalam klausa 3.04. Hakim perbicaraan memutuskan bahawa oleh kerana perayu tidak membuat apa-apa tawaran tanpa syarat untuk kenaikan sewa, menurut klausa 3.04, responden berhak mendapat pembaharuan automatic untuk penyewaan itu tanpa apa-ap kenaikan sewa. Hakim perbicaraan memutuskan bahawa NP itu tidak sah kerana sebab keluarannya — iaitu, bahawa responden telah menolak tawaran kenaikan sewa 8% — adalah cacat. Rayuan ini adalah terhadap keputusan mahkamah perbicaraan.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Hakim perbicaraan terkhilaf kerana mendapati bahawa PP itu telah diperbaharui secara automatik tanpa apa-apa kenaikan sewa kerana: (a) isu tersebut bukan kerana responden telah gagal atau tertinggal untuk menggunakan pilihan bagi memperbaharui penyewaan itu agar hakim perbicaraan bergantung kepada bahagian kedua fasal 3.04, yang tidak relevan; (b) responden telah, sebenarnya, mengesahkan melalui surat pembaharuan penyewaan yang mana perayu menyatakan abhawa jika cadangannya (untuk kenaikan 8%) tidak dipersetujui, perayu mempunyai hak untuk mengenakan kenaikan maksimum 10% kepada sewa itu untuk terma pembaharuan itu; (c) pihak-pihak telah berunding tentang PP baharu itu, yang gagal kerana respoden tidak bersetuju dengan cadangan itu atau fakta bahawa responden secara unilateral bersetuju agar PP tersebut diperbaharui tanpa kenaikan sewa; dan (d) sebagaimana fasal 3.04, perayu berhak kepada sewa maksimum 10% berbanding dengan kadar terma akir sebelum itu kerana setiap pembaharuan PP adalah tertakluk kepada kenaikan sewa maksimum 10% (lihat perenggan 21 & 30).

(2) Jelas tiada *consensus ad idem* antara pihak-pihak untuk memperbaharui PP tersebut tanpa apa-apa kenaikan sewa. Perayu jelas memberitahu responden pada peluang terawal lagi bahawa ia tidak bersetuju untuk mengetepikan apa-apa kenaikan sewa bagi pembaharuan penyewaan tersebut. Keterangan yang dikemukakan semasa perbicaraan menunjukkan bahawa meskipun terma pembaharuan jelas dinyatakan dalam jadual pertama kepada PP tersebut, terdapat pertikaian dan tiada persetujuan yang jelas antara pihak-pihak apabila responden membuat pendirian bahawa penyewaan itu telah pun diperbaharui tanpa kenaikan, yang bercanggah dengan pendirian perayu dan kata-kata nyata PP tersebut. Pendirian yang diambil oleh responden memudaratkan perayu dan sikap tidak endah tentang hak perayu di bawah perjanjian tersebut.

Ia adalah salah bagi responden berhujah bahawa penyewaan itu diperbaharui secara automatik tanpa apa-apa kenaikan atau tidak menghiraukan tentang berapa banyak kadar kenaikan itu. Dalam keadaan sedemikian, perayu berhak menamatkan PP tersebut dengan mengeluarkan NP (lihat perenggan 34(a), 36–38 & 40–41).]

Notes

For cases on construction of agreeement, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7490–7492.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)

Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor [2015] 6 MLJ 310; [2015] 8 CLJ 1068, FC (refd)

Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi bin Hj Puteh & Anor [2019] 2 MLJ 154; [2019] 1 CLJ 713, FC (refd)

Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd [1996] 2 MLJ 81, CA (refd)

Legislation referred to

National Land Code ss 206, 207, 208, 209, 210, 211, 212, 213, 223, 223(1)

Appeal from: Civil Suit No WA-22NCVC-394–07 of 2016 (High Court, Kuala Lumpur)

Cecil Abraham (Aniz Ahmad Amirudin, Phang Soon Mun, Noor Muzalifah bt Shabudin and Chew Chun Wei with him) (Han & Partners) for the appellant.
Gideon Tan (Ya Yoon Jan with him) (Gideon Tan Razali Zaini) for the respondent.

Hanipah Farikullah JCA:

INTRODUCTION

[1] In the High Court, the plaintiff seeks for a declaration that the termination notice issued by the defendant is void and consequently the tenancy agreements are valid.

[2] In response, the defendant brought a counterclaim for a declaration that the renewal of the tenancy agreements is subject to an increase in respect of the rate of 10% and that the termination by the defendant is valid.

[3] We shall be referring to parties in this judgment in their respective

capacity in the High Court, the appellant as the defendant and the respondent as the plaintiff. A

[4] The High Court had after a full trial, allowed the plaintiff's claim and dismissed the defendant's counterclaim. B

[5] We heard the appeal. At the conclusion of the hearing of the appeal, by unanimous decision, we allowed it. The decision of the High Court is set aside.

THE FACTS C

[6] This appeal concerns the plaintiff's tenancies at two shopping malls known as Central Square and Landmark Central which are owned by the defendant and managed by Hektar Property Services Sdn Bhd (the two tenancy agreements). D

[7] Despite the existence of two separate tenancy agreements, the wordings of the renewal clauses were similar in nature.

Proceedings at the High Court E

[8] This case came for trial before the learned judge for two days. The learned judge heard the factual evidence of one witness by the plaintiff and three witnesses by the defendant. As we have stated earlier, the learned judge allowed the plaintiff's claim and dismissed the defendant's counterclaim. F

[9] We would summarise the learned judge's findings and reasoning as follows:

(a) the plaintiff had given the defendant the requisite notices of their intention to renew the tenancies. The plaintiff's notices for renewal was undisputedly coupled with a request to maintain rental at the current rate; G

(b) proceeding from the plaintiff's above request, the defendant wrote to inform that they are not agreeable to maintain rental at the current rate. The defendant was however agreeable to impose only 8% increment, subject to the plaintiff entering into a fresh tenancy agreement. In the event the plaintiff fails to agree to the proposal, the defendant reserves the right to impose a maximum increment of 10%; H

(c) by way of a letter dated 12 January 2015, the plaintiff replied to the defendant stating, inter alia: I

(i) the plaintiff does not agree with the defendant's conditional proposal as the renewal of the tenancy is to be made in accordance

with the provisions of cl 3.04 of both the tenancy agreements; and

(ii) as the first renewal term is to be effected from 23 January 2015, the defendant was to confirm the unconditional monthly rate to enable the plaintiff to make the necessary payments;

(d) in the course of the trial, the defendant through DW3 admitted that they did not respond to the plaintiff's letter dated 12 January 2015. Instead, the defendant chose to enter negotiations with the plaintiff in the hope that the plaintiff will enter into a fresh tenancy agreement to replace the existing tenancy agreements. Negotiations, however, fell through when the plaintiff's representative took the position that the tenancy agreements had been renewed without increment. Thereafter, the defendant issued the notice of termination dated 23 May 2016;

(e) the notice of termination is void for the following reasons:

(i) the notice of termination states that the plaintiff had rejected the defendant's offer of a new rate of increment at 8%. However, the said offer is subject to the plaintiff entering into a fresh tenancy agreement ('conditional offer') which was later rejected by the plaintiff. This is because the new tenancy agreement had terms which are materially different especially in regards to the calculation of rental. The learned judge took the view that the rejection by the plaintiff is the correct position to be taken as the conditional offer clearly departs from the terms of the tenancy agreements to which the defendant had agreed to be bound by virtue of the deed of novation dated 2 October 2012;

(ii) whereas, the plaintiff's letter dated 12 January 2015 had clearly requested the defendant to confirm the unconditional monthly rate to enable the plaintiff to make the necessary payments. The contents of the defendant's letter dated 5 January 2015 stating that the defendant 'shall reserve their right to impose the maximum increment of 10% over the monthly rental payable', can only be viewed as a statement showing the extend of increment which the defendant as landlord can impose. In other words, the defendant had never offered any unconditional increment at the rate of 8% or 10% and that the plaintiff had never rejected any offer of increment whether at the rate of 8% or 10%;

(iii) as there was no such unconditional offer of increment in the monthly rent, despite the existence of evidence of negotiations which fell through, the notice of termination and the termination was issued and carried out prematurely; and

(iv) in this regard, the defendant's pleaded defence and counterclaim that the plaintiff has breached the tenancy agreements by refusing

to pay the increment of 10% or 8% as envisaged in the notice of termination is obviously unsustainable;

(f) the underlined words of cl 3.04 of both tenancy agreements seem to suggest that the plaintiff is entitled to an automatic renewal of the tenancy. As the defendant did not set any increment as to the monthly rental rate in accordance with the terms of the tenancy agreements (save for the fact that the defendant did assert that they are entitled to an increase in rental to the maximum of 10% of the monthly rental rate), the tenancy agreements were renewed without any increment in rental;

(g) with reference to the defendant's submission that the plaintiffs prayer for a declaration that it had valid tenancy agreements up to the year 2033 and 2030 respectively is legally wrong as it contravenes the provisions of s 223(1) of the National Land Code ('the NLC') which provides for power of proprietors to grant tenancies not exceeding three years, the prayer sought after by the plaintiff is not without blanket. If the defendant were to look at prayer (a) at para 40 of the plaintiff's statement of claim, the defendant will note that the validity of the tenancy agreements is premised on the conditions of the tenancy agreements and not an outright tenancy up to the year 2033 and 2030 respectively; and

(h) in any event, having read the provisions of s 223 of the NLC together with the provisions of ss 206 and 213 of the NLC does not in any way prohibits a proprietor from granting tenancies above three years. Section 223, in fact, is only concerned with 'tenancy exempt from registration' which can be created in writing or by word of mouth only and need not comply with the requirements of ss 207–212.

THE APPEAL

[10] By notice of appeal dated 25 October 2017, the defendant appealed against the learned judge decision premised on 12 grounds. However, we would summarise the grounds as follows:

(a) the learned judge erred in law and/or in fact in failing to hold that every renewal for the tenancy agreements for Central Square and Landmark Central tenancy agreement is subject to a maximum rental increment of 10%;

(b) the learned judge erred in law and/or in fact when he held that the defendant had never offered any unconditional increment at the rate of 8% or 10% and that the plaintiff had never rejected any offer of increment whether at the rate of 8% or 10%;

A (c) the learned judge erred in law and/or in fact by failing to judicially appreciate the evidence relating to the negotiations between the plaintiff and defendant which did not materialise;

(d) the learned judge erred in law and/or in fact when he held that the
B Central Square tenancy agreement and the Landmark Central tenancy agreements were renewed without any increment in the rental; and

(e) the learned judge erred in law and/or in fact in not allowing the defendant's counterclaim for:

C (i) a declaration that every renewal under the Central Square tenancy agreement and the Landmark Central tenancy agreement was subject to a maximum 10% increase in rent; and

(ii) a declaration that the defendant's notice of termination dated
D 23 May 2016 was lawful.

[11] The appeal was heard on 27 November 2018. Tan Sri Dato' Cecil Abraham appeared for the defendant and Mr Gideon Tan appeared for the plaintiff. We are grateful to all counsel for their assistance.

E

[12] The first three grounds of appeal are closely linked. We shall therefore deal with them collectively before turning to the other grounds of appeal.

Whether every renewal of the tenancy is subject to maximum rental increment of
F *10%*

[13] The question before us calls for some analysis of the effect of cl 3.04 of the tenancy agreements. Learned counsel for the defendant submitted that:

G (a) the learned judge failed to construe or construe properly cl 3.04 of the tenancy agreements which entitled the defendant to increase the rental at a maximum of 10% over the rate of the last preceding term;

(b) the learned judge failed to hold that every renewal for the tenancy agreements is subject to a maximum rental increment of 10%; and
H

(c) the learned judge has erred when he held that the tenancy agreements were renewed without any increment in the rental.

[14] Learned counsel for the plaintiff resisted these arguments. He pointed
I out that the defendant has never informed the plaintiff of its intention to increase by 10% in the rental rate and the defendant only intended to force the plaintiff to enter into a new set of tenancy agreements with an increment in rental of 8%.

[15] It is not disputed between the parties that on 20 November 2014 the plaintiff wrote to the defendant to renew the tenancy agreements pursuant to cl 3.04 of the tenancy agreements.

[16] It is necessary to refer to cl 3.04 of both the tenancy agreements which provide as follows:

> (3.04)(a) *The Landlord hereby agrees to grant the Tenant an option to renew the tenancy of the Demised Premises on expirv of the term hereby created for six (6) separate but consecutive terms of three (3) years each with rental increment at maximum of ten per centum (10%) over the rate of the last preceding term* (which terms shall hereinafter be separately but in successive order referred to as the 'Second Term', 'Third term', 'Fourth Term', 'Fifth Term', 'Sixth Term' and 'Final Term') as specified in and at the monthly rental and subject to the Security Deposits as stated in Section 9 of the First Schedule herein, provided that if the Tenant shall be desirous of exercising the option to renew the said consecutive terms, *it shall exercise the same separately and in successive order and shall not less than three (3) calendar months of each of the aforesaid consecutive terms (except the Final Term) give a written notice to the Landlord of such desire* and if it shall have paid all the rents reserved and shall have performed and observed the several stipulations contained and on its part to be performed and observed up to the termination and subsisting immediately before the commencement of the tenancy so desired to be renewed, then the Landlord shall let the Demised Premises to the Tenant for such further term(s) and at such rental(s) as determined in the manner provided by Section 9 of the First Schedule hereto and payable as therein provided and subject in all other respects to the same stipulations as are herein contained expect that the covenant to renew as in this Clause shall not be contained in the agreement for the Final term.
>
> *Notwithstanding anything aforesaid, if the Tenant shall omit or howsoever fail to renew or exercise the option to renew any of the said consecutive terms in the manner aforesaid then the Tenant shall be entitled to automatic renewal(s) of the tenancy* SAVE where the Tenant gives a six (6) months written notice prior to the expiry of the fixed term or extended term or renewed term (whichever may apply) of the Tenant's intention not to exercise the option to renew the tenancy and the Landlord shall refund the Security Deposit free of interest to the Tenant but without prejudice to the right of action of the Landlord in respect of any antecedent breach of the Tenant's covenants herein contained.

[17] We regret that we are unable to accept the learned judge's construction of cl 3.04 of the tenancy agreements.

[18] On this issue, in our view, the judge was plainly wrong for the reasons which we will set out below when he said, at para 32 of his judgment that cl 3.04 of the tenancy agreements mean the extent of the increment that the defendant can impose is as follows:

> [32]
>
> ...

A (a) ... It is an uncontroverted fact that apart from relying on the contents of their letter of 5 January 2015 stating that the defendant shall reserve their right to impose the maximum increment of 10% to the monthly rent payable', the defendant never informed the plaintiff what the unconditional monthly rate is. This statement surely cannot be relied upon to say that the defendant is imposing an increment of
B 10% over the monthly rental payable. At most, it can only be viewed as a statement showing the extend of increment which the defendant as landlord can impose. In other words, *I took the position that the defendant had never offered any unconditional increment at the rate of 8% or 10% as the case may be (see pp 112–113 NOP) and that the plaintiff had never rejected any offer of increment whether at the rate of 8% or 10%*
C ...

...

[19] The judge agreed with the plaintiff's submissions and further the learned judge was of the view that the defendant did not set any increment as
D to the monthly rental in accordance with the terms of the tenancy agreements save for the fact that the defendant did assert that they are entitled to an increase in rental to the maximum of 10% of the monthly rental rate.

E **[20]** A literal reading of cl 3.04 of the tenancy agreements shows that:

(a) the defendant agrees to grant the plaintiff an option to renew the tenancy upon expiry for certain separate but consecutive terms of three years each *with rental increment at a maximum of ten per centum over the rate of the last preceding term;*

F (b) provided that, if the plaintiff is desirous of exercising the option to renew, it shall exercise the same separately and in successive order not less than three calendar month of each of the consecutive terms by giving written notice to the defendant of such desire; and

G (c) if the plaintiff omits or howsoever fails to renew or to exercise the option to renew any of the consecutive terms in the manner aforesaid then the defendant shall be entitled to automatic renewal(s) of the tenancy.

[21] We, therefore, agreed with the defendant submission that the learned
H High Court judge had clearly erred in finding that the tenancy agreements were automatically renewed without any increment in rental for the following reasons:

(a) the plaintiff did, in fact, confirm the renewal of the tenancy by way of
I letter dated 20 November 2014;

(b) the defendant's letter dated 5 January 2015 stating that if their proposal is not agreeable, defendant reserves their rights to impose the maximum increment of 10% to the monthly rent payable during the renewed term;

(c) the parties were in negotiations on the fresh tenancy agreements which failed; and

(d) the negotiations failed as the plaintiff could not agree on the proposal or the fact that the plaintiff unilaterally decided that the tenancy agreements were renewed with no increment. As per cl 3.04, the defendant would be entitled to the rental at a maximum of 10% over the rate of the last preceding term as every renewal for the tenancy agreements is subject to a maximum rental increment of 10%.

[22] It is well to discuss at this stage the chain of agreements or alleged agreements relied upon by the plaintiff. as the tenancy agreements were close to expiry, the plaintiff and the defendant started negotiating on the renewal terms of the tenancy agreements. The plaintiff wrote a letter dated 20 November 2014 to the appellant informing them that they intended to renew the tenancy agreements and requested for the monthly rental for the renewal term to be maintained as per the last preceding term's monthly rental.

[23] The defendant in response wrote a letter dated 5 January 2015 expressly stating that: (i) they do not agree to any renewal without increment; (ii) nevertheless and as a gesture of goodwill, they are agreeable to impose only 8% if, among others, the plaintiff enters into a fresh tenancy agreement with the defendant ('proposal'); and (iii) should the plaintiff disagree with the proposal, defendant shall reserve the right to impose the maximum increment of 10% of the monthly rent payable during the renewed term.

[24] In response, the plaintiff wrote a letter dated 12 January 2015 stating amongst others, that: (i) they do not agree with the proposal; (ii) the defendant to confirm the unconditional monthly rental rate for the renewal term to enable them to make the payment; and (iii) on a strictly without prejudice basis, should the defendant insist on the proposal, to send the draft fresh tenancy agreement or reference and consideration.

[25] Thereafter from 12 January–18 November 2015, parties continued negotiations on the renewal and on the prospect of a fresh tenancy agreement, however, evidence shows that matter was prolonged due to the lack of urgency on the part of the plaintiff to expedite the resolution of the negotiation.

[26] On 23 December 2015, the plaintiffs sole witness during the trial, PW1 sent an email to the defendant stating amongst others, that:

(a) the tenancy for the demised premised at Central Square has been renewed for the first renewal term from 23 January 2015–22 January 2018 in accordance to cl 3.04 of the tenancy agreement dated 10 January 2012 *with no increment to the renewal monthly rental*;

(b) the tenancy for the demised premises at Landmark Central has been renewed for the first renewal term from 15 October 2015–14 October 2018 in accordance to cl 3.04 of the tenancy agreement dated 10 April 2012 *with no increment to the renewal monthly rental*; and

(c) as such, there is no issue of tenancy renewal for both demised premises as well as the renewal monthly rental.

[27] It is worth noting that the defendant wrote by way of a letter dated 2 February 2016 to the plaintiffs group managing director stating amongst others, that:

(a) the good working relationship with plaintiff which now seems to be changing;

(b) the plaintiff's tenancies at Central Square and Landmark Central have expired last year and both parties have been in discussions and negotiations in respect of the renewal of the tenancies;

(c) several meetings have been held between PW1 and representatives from the defendant's leasing team and the chronology of events will show the proposed renewal of the tenancies;

(d) PW1's recent email demonstrates his lack of goodwill and good faith in honoring the discussions and negotiations between both parties for the past 12 months in attempting to resolve the outstanding issues surrounding the renewal of the tenancies at Landmark Central and Central Square;

(e) on the other hand, defendant has in good faith continued to bill plaintiff at the old monthly rental rate only on the mutual understanding that once the parties agree on the new rental rate for the renewal term, the plaintiff will pay the difference in rental between the old and new rate commencing from the expiry of the previous tenancy term; and

(f) ample opportunities have been given for the matter to be resolved amicably but there has been no urgency on the part of PW1 to expedite the resolution of the matter.

[28] The evidence adduced during the course of the trial clearly shows that the defendant was unable to agree with the plaintiff's unilateral position and as such, the defendant issued a notice of termination dated 23 May 2016. The said notice of termination stated amongst others, that:

> We refer to the above matter.
>
> Reference is also made to our letter dated 2.2.2016 and your reply dated 5.4.2016 ('Letters').

> Further to the said Letters, we regret to note that despite ample opportunities given to resolve the long outstanding issue surrounding the renewal of your tenancies at Landmark Central and Central Square ('Tenancies'), parties are still unable to agree on the renewal terms for the said Tenancies. On this note, we have offered you a new rate at 8% increment over the last preceding term's monthly rental in accordance with Clause 3.04(a) of the Tenancy Agreement, however the same was rejected by you. Therefore, your Tenancies are deemed to be on a monthly rollover basis and are subject to termination with 1 month's prior notice.

[29] After a careful examination of the correspondences between the parties, we have no hesitation in reaching a different conclusion on the matter concerned as was reached in the court below.

[30] We, therefore, agreed with the defendant submission that the learned judge had clearly erred in the above finding that the tenancy agreements were automatically renewed without any increment in the rental for the following reason:

(a) as stated above, the issue here is not that plaintiff failed or omitted to renew the tenancy agreements for the learned judge to rely on the second part of cl 3.04 in the first place as it is not relevant;

(b) the plaintiff did, in fact, confirm the renewal of the tenancy by way of letter dated 20 November 2014;

(c) the defendant's letter dated 5 January 2015 stating that if their proposal is not agreeable, defendant reserves their rights to impose the maximum increment of 10% to the monthly rent payable during the renewed term;

(d) the parties were in negotiations on the fresh tenancy agreements which failed; and

(e) as the negotiations failed as the plaintiff could not agree on the proposal or the fact that plaintiff unilaterally decided that the tenancy agreements were renewed with no increment. As per cl 3.04 of the tenancy agreements, the defendant would be entitled to the rental at a maximum of 10% over the rate of the last preceding term as every renewal for the tenancy agreements is subject to a maximum rental increment of 10%.

[31] In fact, PW1 in cross-examination admitted that pursuant to cl 3.04 of the tenancy agreements, the defendant is entitled to a rental increment at the maximum of 10% over the last proceeding term.

[32] The second ground of appeal by the defendant is that the notice of termination is valid.

The intention of the parties

[33] We now come to the final issue. In our opinion, the crux of the whole matter depends upon whether there was consensus ad idem between the plaintiff and the defendant to renew the tenancy agreements without any rental increment. This is in our view, was really the central issue of the present disputes.

[34] It is at the material time pertinent to highlight that parties were still in negotiations and that negotiations broke down when the plaintiff took the unilateral position that the tenancy agreements were renewed with no increment. In this connection, the learned judge erred in law and in fact by failing to fully evaluate and consider the evidence tendered by parties in relation to this issue based on the following reasons:

(a) the defendant had expressly informed plaintiff at the earliest opportunity in 5 January 2015 that they are not agreeable to waive any rental increment for the renewal. They further informed that if the plaintiff is not agreeable to the defendant's proposal, the defendant reserved their rights to impose the maximum increment of 10% to the monthly rent payable during the renewed term;

(b) the plaintiff by way of letter dated 12 January 2015 rejected defendant's proposal and requested for the 'confirmed unconditional monthly rental rate' for the renewal term, they also informed that 'on a strictly without prejudice basis, should you insist to offer us the conditional monthly rental increment rate, kindly send us your draft tenancy agreement for our reference and consideration'; and

(c) although there was no specific written reply to the above letter by the defendant, negotiations did take place between the parties for almost 12 months between 12 January–18 November 2015 as it was also found by the learned judge:

> [30] In the course of trial, the defendant thru DW3 admitted that they did not respond to the plaintiff's letter dated 12 January 2015. Instead, the defendant chose to enter negotiations with the plaintiff in hope that the plaintiff will enter into a fresh tenancy agreement to replace the existing TAs. Negotiations however, fell through when the plaintiff's representative took the position that the TAs had been renewed without increment. Thereafter, the defendant issued the notice of termination dated 23 February 2016 ('NOT').

[35] Having decided that the tenancy agreements were renewed without increment, the learned judge held that the defendant's notice of termination was void for the following reasons:

(a) *the NOT states that the plaintiff had rejected the defendant's offer of a new rate of increment at 8%. This is entirelv wrong. The defendant never made such offer of increment at the rate of 8%. What the defendant did was to offer the 8% increment subject to the plaintiff entering into a fresh tenancv agreement ('conditional offer') (see evidence of SP3 at pp 112–113).* This is was accordingly rejected by the plaintiff. The new tenancy agreement had terms which are materially different on the issue of calculation of rental. Under the TAs, rental of the demised premises is calculated inclusive of service and promotional charges. The new tenancy agreements separate the rental charges from the service charges, promotional charges, advertising charges and other further charges which are subject to increase at the sole discretion of the defendant (see cll 11.3 and 11.4 of the new tenancy agreement). *To my mind, the rejection by the plaintiff is the correct position to be taken as the conditional offer clearly departs from the terms of the TAs to which the defendant had agreed to be bound bv virtue of the deed of novation date 2 October 2012.*

[36] On this issue, learned counsel for the plaintiff supported the learned judge's reasoning and on the other hand learned counsel for the defendant disputed it. In considering the issue, we have looked at the evidence adduced by the parties and we found that the learned judge is plainly wrong as there is clearly no *consensus ad idem* between plaintiff and defendant to renew the tenancy agreements without any rental increment based on the following facts:

(a) the tenancy agreements clearly allows for rental increment at a maximum of 10% over the last preceding term wherein even the rental rate for the renewal term is expressly stated in the first schedule of the tenancy agreement for Central Square;

(b) the defendant expressly informed plaintiff that defendant is not agreeable to the waiver of any rental increment and would reserve the right to impose maximum rental increment. Subsequently, the defendant was negotiating with plaintiff on the renewal particularly on the prospect of the signing of a new tenancy agreement by plaintiff wherein defendant would then impose only 8% increment which is why defendant continue to impose old rental during this period;

(c) the defendant then expressly informed that if the plaintiff is not agreeable to sign a new tenancy agreement, the defendant would impose the maximum 10%; and

(d) the plaintiff, however, took the position that the tenancy agreements were renewed automatically with no rental increment. This position is detrimental to the defendant and is a blatant disregard of the defendant's rights under the tenancy agreements. This eventually led to the termination of the tenancy agreements by the defendant in which the defendant clearly entitled to do so.

[37] The evidence adduced during trial shows that despite the rent for the renewed term was expressly stated in the first schedule to the tenancy agreements, there are a clear dispute and disagreement between plaintiff and defendant when plaintiff took the position that the tenancy agreements were renewed with no increment which is contrary to defendant's position and the express wording of the tenancy agreements.

[38] Accordingly, it is wrong for the plaintiff to argue that the same can be automatically renewed with no increment or with no regard as to how much the increment rate would be.

[39] This court had decided in *Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd* [1996] 2 MLJ 81 where His Lordship VC George JCA said that:

> The question is whether there was a concluded agreement. *If no agreement had been arrived at on that most crucial element of the agreement — rent — there cannot be said to be a concluded agreement.* That the parties might eventually agree on the rent does not make for a concluded agreement. The question 'what if they never arrive at an agreement as to the new rent?' brings home the lack of merit in the submission.

(See also: *Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi bin Hj Puteh & Anor* [2019] 2 MLJ 154; [2019] 1 CLJ 713 (FC); *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 8 CLJ 1068 (FC); *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 (SC)).

[40] As such, we are of the view that it is only reasonable for the defendant to terminate the tenancy agreements which have already expired as the same were rolled over on a monthly tenancy basis while parties were actively negotiating on the renewal.

[41] Having regards to our conclusion on the above issues, it follows that the termination of the tenancy agreements was valid.

CONCLUSION

[42] For the reasons set out above, we would allow the defendant's appeal with cost of RM100,000 for here and below subject to the payment of allocator. Accordingly, the decision of the High Court judge is set aside.

Appeal allowed; High Court's decision set aside.

Reported by Ashok Kumar